[Cite as *State v. Gibson-Sweeney*, 2006-Ohio-1691.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2005-L-086**
- vs -	:	
LORRAINE GIBSON-SWEENEY,	:	
Defendant-Appellee.	:	

Criminal Appeal from the Willoughby Municipal Court, Case No. 05 TRC 01370.

Judgment: Reversed and Remanded.

Joseph P. Szeman, Village of Kirtland Hills Prosecutor, 77 North St. Clair Street, #100, Painesville, OH 44077 (For Plaintiff-Appellant).

Richard J. Perez, Rosplock & Perez, Interstate Square Building I, 4230 State Route 306, #240, Willoughby, OH 44094 (For Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, the State of Ohio (Village of Kirtland Hills) appeals the judgment of the Willoughby Municipal Court granting defendant-appellee, Lorraine Gibson-Sweeney's motion to suppress. For the foregoing reasons, we reverse and remand the decision of the lower court.

{¶2} Undisputed testimony at the hearing on Gibson-Sweeney's motion to suppress reveals the following. At approximately 2:49 a.m., on February 12, 2005, Officer Jeffrey Bilicic of the Village of Kirtland Hills Police Department, was in his police

cruiser in the right-hand "breakdown lane" on Interstate 90 East in Kirtland Hills, Ohio, having just completed a traffic stop of another vehicle. At the time, the headlights and the red interior dome light of Officer Bilicic's vehicle were on, and his overhead lights were off. There were no lights on that portion of the highway. While entering information into his police log, Officer Bilicic observed a vehicle, driven by appellee, approach from behind in his rear-view mirror. After Gibson-Sweeney's vehicle had passed his police cruiser by approximately 100 feet, Officer Bilicic looked up and saw appellee's vehicle drift over the right hand edge line, by a distance of about two to three inches from the inside edge of the tires, and continued so traveling for a distance of approximately 600 feet, before crossing back into the lane of travel.

{¶3} Upon observing this, Officer Bilicic re-entered the roadway and followed Gibson-Sweeney's vehicle. Officer Bilicic testified that Gibson-Sweeney's vehicle was "some distance ahead of him" before he re-entered the roadway, and that her vehicle had subsequently re-entered the lane of travel without any further incident. Officer Bilicic further testified that he was in the process of running the license plate number on Gibson-Sweeney's vehicle, when she pulled into a rest stop less than a mile up the road. Officer Bilicic eventually caught up to Gibson-Sweeney's vehicle at the same time she was leaving the roadway to enter the rest stop. Officer Bilicic stated that he then followed her into the rest stop, for the purpose of issuing a citation for a marked lane violation. When asked why he waited for appellee to enter one of the parking spots before activating his overhead lights and approaching appellee's vehicle, Officer Bilicic testified that it would not have been safe to pull her over because of the number of trucks on the side of the road in the rest area.

{¶4} Officer Bilicic then approached appellee's vehicle and informed her of the reason for the stop, at which time Gibson-Sweeney informed him that the reason she had crossed over the line was because she was "paying attention to me at the side of the road." As Bilicic was talking to Gibson-Sweeney, he detected a "strong odor" of alcohol and "observed her eyes to be bloodshot and glassy." When Officer Bilicic asked Gibson-Sweeney how much she had to drink, she responded that she had three beers that night.

{¶5} Officer Bilicic then asked Gibson-Sweeney to step out of the vehicle, for the purpose of conducting standardized field sobriety tests. Based on the foregoing observations, and Gibson-Sweeney's performance on the field sobriety tests, she was charged with driving under the influence of alcohol, in violation of R.C. 4511.19(A)(1) and cited for driving outside the marked lanes of travel, in violation of Village of Kirtland Hills Codified Ordinance 331.08(A).

{¶6} On April 14, 2005, Gibson-Sweeney filed a motion to suppress. A hearing was held on appellee's motion on May 11, 2005. In its judgment entry, the court stated that "[b]ased upon the totality of the circumstances, and the credibility of the testimony, the Court finds Officer Bilicic did not have probable cause to stop Defendant's vehicle."

{¶7} On June 3, 2005, the court granted Gibson-Sweeney's motion to suppress. The State timely appeals, asserting a single assignment of error:

{¶8} "The trial court erred to the prejudice of the State and Village in granting the motion to suppress filed by the defendant-appellee."

{¶9} Our analysis of the case sub judice begins by a discussion of the appropriate standard of review.

{¶10} Appellate review of the grant or denial of a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. In ruling on a motion to suppress, the trial court functions as the trier of the facts, since it is in the best position to weigh the evidence, resolve factual questions, and evaluate the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366. As a result, an appellate court is obligated to accept the trial court's findings of fact if they are supported by some competent, credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592. Thus, accepting such factual findings as true, we independently determine as a matter of law, without deference to the trial court's conclusions, whether the applicable legal standard has been met. Id.; *State v. Searls* (1997), 118 Ohio App.3d 739, 741.

{¶11} The Fourth Amendment to the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ***." The Fourth Amendment is enforced against the States by virtue of the due process clause of the Fourteenth Amendment of the United States Constitution. *Mapp v. Ohio* (1961), 367 U.S. 643, 655. The stop of a vehicle and the detention of its occupants by law enforcement, for whatever purpose and however brief the detention may be, constitutes a seizure for Fourth Amendment purposes. *Delaware v. Prouse* (1979), 440 U.S. 648, 653, citing *United States v. Martinez-Fuerte* (1976), 428 U.S. 543, 556-558.

{¶12} Kirtland Hills Codified Ordinance No. 331.08(A), which mirrors R.C. 4511.33 provides:

{¶13} "Whenever any roadway has been divided into two or more clearly marked lanes for traffic, or wherever traffic is lawfully moving in two or more substantially continuous lines in the same direction, *** a vehicle shall be driven, as nearly as is practicable, entirely within a single line or lane of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety."

{¶14} The State maintains that Officer Bilicic's observation of appellee's marked lane violation provided probable cause to believe a traffic offense was committed and, accordingly, the initial stop of Gibson-Sweeney's vehicle was constitutional. Appellee counters, and the trial court agreed, that an investigatory stop, based upon a de minimis marked lane violation, without some additional evidence suggesting impairment, was in violation of her Fourth Amendment rights. On the facts, as found by the trial court, we agree with the State's position.

{¶15} The Supreme Court of Ohio has held that "where a police officer stops a vehicle based on probable cause that a traffic violation has occurred or was occurring, the stop is not unreasonable under the Fourth Amendment *** even if the officer had some ulterior motive for making the stop, such as a suspicion that the violator was engaging in more nefarious criminal activity." *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431, at syllabus, citing *United States v. Ferguson* (C.A. 6, 1993), 8 F.3d 385, 391. The focus on the particular inquiry necessarily turns on what the officer knew at the time he made the stop, and not what occurred after the stop. Id. at 10.

{¶16} This court has repeatedly followed the rule of *Erickson* in situations where the officer has personally observed any violation of a traffic law or ordinance. See *State*

v. Teter (Oct. 6, 2000), 11th Dist. No. 99-A-0073, 2000 Ohio App. LEXIS 4656, at *11 (marked lane violation under R.C. 4511.33); *State v. Yemma* (Aug. 9, 1996), 95-P-0156, 1996 Ohio App. LEXIS 3361, at *8-*9 (changing lanes without a proper signal, in violation of R.C. 4511.39); *State v. Stamper* (1995), 102 Ohio App.3d 431, 438-439 (driving left of center in violation of R.C. 4511.25) (citation omitted); *State v. Brownlie* (Mar. 31, 2000), 11th Dist. Nos. 99-P-0005 and 99-P-0006, 2000 Ohio App. LEXIS 1450, at *7-*8 (failure to dim high beams when facing approaching traffic, in violation of R.C. 4513.15).

{¶17} In the case sub judice, the trial court found on the basis of the testimony at the hearing, and neither party disputes, that appellee crossed the outside edge line of the highway after passing the spot where Officer Bilicic was sitting in his vehicle, which is a *prima facie* violation of R.C. 4511.33 or Kirtland Hills Codified Ordinance No. 331.08(A). A review of the judgment entry granting appellee's motion to suppress reveals that the sole issue on which the motion was granted was whether the initial stop was supported by probable cause. Since Officer Bilicic had probable cause to initiate the stop of Gibson-Sweeney's vehicle solely on the basis of her marked lane violation, we hold that the trial court's grant of appellee's motion to suppress was error as a matter of law.

{¶18} Accordingly, we reverse the judgment of the Willoughby Municipal Court and remand for proceedings consistent with this opinion.

DONALD R. FORD, P.J., concurs,

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with a Dissenting Opinion.

{¶19} For the following reasons, I respectfully dissent.

{¶20} At a hearing on a motion to suppress, the trial court functions as the trier of fact. Accordingly, the trial court is in the best position to weigh the evidence by resolving factual questions and evaluating the credibility of witnesses. *State v. Mills* (1992), 62 Ohio St.3d 357, 366; *State v. Smith* (1991), 61 Ohio St.3d 284, 288.

{¶21} On review, an appellate court must accept the trial court's findings of fact if they are supported by competent and credible evidence. *State v. Retherford* (1994), 93 Ohio App.3d 586, 592. After accepting the factual findings as true, the reviewing court must independently determine, as a matter of law, whether the applicable legal standard has been met. Id. at 592. See, also, *State v. Swank*, 11th Dist. No. 2001-L-054, 2002-Ohio-1337, 2002 Ohio App. LEXIS 1345. The majority is disregarding the trial court's role as factfinder.

{¶22} The Fourth Amendment guarantees individuals the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures. A temporary detention of an individual during a police officer's automobile stop, no matter how brief or limited in purpose, constitutes a "seizure" of the individual under the Fourth Amendment. *Delaware v. Prouse* (1979), 440 U.S. 648, 653. Hence, if the surrounding circumstances establish that an automobile stop is unreasonable, the stop violates the individual's constitutional right to be secure in his or her person. Id. at 659.

{¶23} Whether a traffic stop violates the Fourth Amendment requires an objective assessment of a police officer's actions at the time of the stop, in light of the facts and circumstances then known to the officer. *United States v. Ferguson* (C.A.6, 1993), 8 F.3d 385, 388. The police officer's subjective motivation for initiating the stop is irrelevant to this analysis. *City of Dayton v. Erickson* (1996), 76 Ohio St.3d 3, 6.

{¶24} That being said, if the surrounding circumstances establish that a police officer witnessed an individual violate a traffic law, the officer has probable cause to affect a constitutional stop. *State v. Montes*, 11th Dist. No. 2003-L-072, 2004-Ohio-6475, at ¶21. See, also, *State v. Carleton* (Dec. 18, 1998), 11th Dist. No. 97-G-2112, 1998 Ohio App. LEXIS 6163, at 8. Following the stop, the officer may proceed to investigate the detained individual for DUI if the officer has a reasonable suspicion that the individual may be intoxicated based upon specific and articulable facts. *Montes* at ¶20. See, also, *State v. Haynes*, 11th Dist. No. 2003-A-0055, 2004-Ohio-3514, at ¶14.

{¶25} In the case sub judice, the trial court's decision granting appellee's motion to suppress determined that Officer Billicic did not have probable cause to initiate a stop of appellee's vehicle. The trial court determined that appellee's alleged traveling over marked lanes was not a reasonable justification to initiate the stop, as that act standing

alone was insufficient to demonstrate a marked lane violation. Furthermore, "although the appellate courts of this state are in general agreement that *not every edge line crossing by a motorist permits police to conduct a traffic stop, instances of erratic or substantial roadway line crossing will vest a police officer with probable cause to perform such a stop*." (Emphasis added.) *State v. Schofield* (Dec. 10, 1999), 11th Dist. No. 98-P-0099, 1999 Ohio App. LEXIS 5945, at 9.

{¶26} "*** [T]here must be some indicia of erratic driving to warrant an investigative stop beyond some incident of modest or minimal weaving in one's lane alone." *State v. Spikes* (June 9, 1995), 11th Dist. No. 94-L-187, 1995 Ohio App. LEXIS 2649, at 10. Thus, "police officers may lawfully stop a motor vehicle solely on the basis that the vehicle is weaving, but only when the extent of the weaving [is] what can be described as *substantial*." (Emphasis added.) *Willoughby v. Zvonko Mazura* (Sept. 30, 1999), 11th Dist. No. 98-L-012, 1999 1999 Ohio App. LEXIS 4642, at 8.

{¶27} To justify his stop in this case, the police officer charged appellee with a marked lanes violation of the Kirtland Hills ordinance mirroring R.C. 4511.33, to wit:

{¶28} "(a) Whenever any roadway has been divided into two or more clearly marked lanes for traffic or wherever traffic is lawfully moving in two or more substantially continuous lines in the same direction, the following apply:

{¶29} "(1) A vehicle shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety."

{¶30} Contrary to the state's assertion that failure to drive in a marked lane is an automatic violation, the statute itself permits the driver discretion to cross marked lanes

if the driver ascertains that the movement can be made safely. The trial court's findings of fact and the officer's uncontroverted testimony in this matter establish that appellee moved outside her lane, but in a manner compromising no one's safety. The trial court determined that appellee's de minimus lane infringement did not constitute a traffic violation. Reviewing this matter for abuse of discretion, we are bound by the trial court's finding.

{¶31} The traffic code exists to protect all citizens using our roadways; its overriding purpose is to allow the safe operation of motor vehicles. It does not impose strict liability and an automatic violation every time someone goes slightly outside their lane. It is up to the trial court to determine if a violation of both aspects of the statute has occurred; i.e., that a lane has been crossed, and that it was unsafe to do so. In this case, the trial court determined that there was no violation. Citizens do not throw their Fourth Amendment right against illegal search and seizure out the car window simply because they drive. It is common for drivers to veer outside of their lane of traffic. The statute provides for some discretion in operating a motor vehicle. It is not a pretext providing probable cause for DUI stops.

{¶32} Appellant argues that even a de minimus traffic violation provides a police officer with the requisite probable cause to stop a vehicle. Appellant cuts its argument to fit *Erickson*. *Erickson* is not about de minimus violations. It is about drivers committing an actual violation which includes objectively unsafe operation of a motor vehicle. Police cannot just follow a driver in the knowledge that eventually an over the line error will occur, allowing them to swoop in and evaluate the driver for intoxication. Police have the authority to stop motorists for probable cause for drunk driving. They

do not need to disguise a DUI stop as a marked lane violation. The common habits of all drivers in going down steep hills, negotiating narrow roads, drifting to the right while adjusting the radio in the middle of the night, and keeping toward the center to avoid a dark and dangerous soft shoulder should not precipitate a traffic stop.

{¶33} In *Erickson,* the Ohio Supreme Court concluded that minor traffic violations provide probable cause for a police stop. Id. at 11-12. It did not conclude that the police could stop motorists who did not violate a traffic law. R.C. 4511.33 requires two elements to exist in determining a marked lane violation: (1) the crossing of a marked lane; and (2) that the crossing of the lane be unsafe. In this case, there was no evidence that appellee's lane crossing was unsafe. Quite simply, there was no statutory violation.

{¶34} The majority's analysis fails to consider the entire language of the statute as written. The trial court correctly determined that there was no probable cause for a stop in this case, since there was no statutory violation.

{¶35} My independent examination of the relevant law has established that the applicable legal standard has been met. The trial court did not err in granting appellee's motion to suppress. I hereby respectfully dissent from the judgment of the majority.